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Thomas L. Shaffer

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## ARTICLES

### On Lying For Clients

Thomas L. Shaffer\*

I am happy I was given the privilege of meddling with impunity in other peoples affairs without really doing any harm by belonging to that avocation whose acolytes have been absolved in advance for holding justice above truth I have been denied the chance to destroy what I loved by touching it

—Gavin Stevens<sup>1</sup>

\* \* \*

"I'm interested in truth," the sheriff said.

"So am I," Uncle Gavin said. "It's so rare. But I am more interested in justice and human beings."

"Ain't truth and justice the same thing?" the sheriff said.

"Since when?" Uncle Gavin said. "In my time I have seen truth that was anything under the sun but just, and I have seen justice using tools and instruments I wouldn't want to touch with a ten-foot fence rail. . . ."

. . . .

"What book is that in?" [the sheriff said]. . . .

"It's in all of them. . . . The good ones, I mean."

—William Faulkner<sup>3</sup>

For all of his occasional resort to deceit and falsehood, Faulkner's county-seat, Southern-gentleman lawyer, Gavin Stevens, was a virtuous person, a good person, and a truthful person. He and other moral worthies in good stories—many of them lawyers—have something to contribute to discussions, in legal ethics, on the issue of lying for clients.

In negative terms, such American lawyer stories suggest a turn away from analysis of duty and consequence, of critical moments and "ethical dilemmas" and *statements* and dry rationality. Cleanth Brooks said of Faulkner's lawyer stories that it is the villains in them who are rational: "The

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\* Robert and Marion Short Professor of Law, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic. I am grateful for the assistance of Alexandrea Barrau, G. Robert Blakey, Carrie DiSanto, Herbert Fingarette, Monroe H. Freedman, Linda Harrington, Kent Hull, Stephen L. Pepper, Robert E. Rodes, Jr., Nancy J. Shaffer, and John Howard Yoder.

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1 WILLIAM FAULKNER, *THE MANSION* 363 (Vintage Books 1959).

2 WILLIAM FAULKNER, *An Error in Chemistry*, in *KNIGHT'S GAMBIT* 111 (Random House 1949). Not all of Gavin's preference was vicarious and professional. His recurrent client in *THE TOWN* and *THE MANSION*, Linda Snopes Cole, once said to him: "I love you . . . because every time you lie to me I can always know you will stick to it." FAULKNER, *supra* note 1, at 175.

3 FAULKNER, *KNIGHT'S GAMBIT*, *supra* note 2, at 131.

good man," he said, "has to transcend his mere intellect with some overflow of generosity and love."<sup>4</sup>

What stories have to say about lying for clients seems useful just now, when the despairing suggestion in both popular discourse and learned discussion is that a person cannot practice law truthfully. "How do you tell when a lawyer is lying?" the joke asks. Answer: "When his lips are moving." The average American lies thirteen times a week; lawyers lie more often.<sup>5</sup>

Grim jokes about dishonest lawyers are, of course, old stuff in American culture. What is new is the plea of guilty from academic lawyers who ponder the morals of law practice. Professor Lisa Lerman told us, five years ago, on what appeared to be a sound clinical basis, that we modern American lawyers routinely lie to our clients—to get business, to keep business, to make money. Her moral assessment was to disapprove of lying for "direct" gain but to tell us that we have to accept a certain amount of it as part of representing clients.<sup>6</sup> Professor Carrie Menkel-Meadow, also talking mostly about lying to clients, proposed what is in part a response to Professor Lerman's moral guideline: Don't lie if, in the circumstances, you would not want to be lied to, she said.<sup>7</sup>

Several legal educators trace this admission that lawyers cannot be truthful to broad vocational sources:

—to the emphasis the professional tradition puts on civility, and a traditional tendency to euphemism, so that we do not know a lie when we see one;

—to fraternal loyalty, and lawyers' reluctance to punish their dishonest colleagues;<sup>8</sup>

—to the "Socratic method" in law teaching,<sup>9</sup> the practitioners of which were told, long ago, by Karl Llewellyn, to treat ethics, social policy, and their students' sense of justice as "woozy thinking"<sup>10</sup>—so that the person Dean Anthony Kronman sees as the good law teacher<sup>11</sup> is determined to subvert the moral instincts of her students and to arrest moral development at Lawrence Kohlberg's fourth level of moral development (on a scale of six);<sup>12</sup>

—to modern clinical skills training in law school, particularly to training in the art of negotiation with other lawyers, where deception is said to

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4 CLEANTH BROOKS, *William Faulkner: Vision of Good and Evil*, in *THE HIDDEN GOD* 41 (1963).

5 Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

6 *Id.*

7 Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 764 (1990).

8 Frederick Miller, *Commentary: "If You Can't Trust Your Lawyer . . . ?"*, 138 U. PA. L. REV. 785, 785 (1990) (as to both points).

9 See generally Paul G. Haskell, *Teaching Moral Analysis in Law School*, 66 NOTRE DAME L. REV. 1025 (1991).

10 KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 101 (1951).

11 See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

12 LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 18 (1981).

be essential and professional regulation distinguishes falsehood from telling lies.<sup>13</sup>

Immanuel Kant, maybe the greatest of all practitioners of ethical analysis, could not find an analysis of moral duty that would justify lying to a ruffian who appeared to be bent on murdering somebody.<sup>14</sup> Shirley Letwin, who deals with ethics in stories, considers Anthony Trollope's Victorian English gentlemen—many of whom were lawyers—and says that a gentleman will lie to protect his friend. But a gentleman, she said, will not pretend that he has not lied.<sup>15</sup> What Letwin did was to suggest *meaning*, rather than a principled analysis, and that is, I think, a useful thing to do in ethics. The meaning I suppose one might find in Trollope is in the connection between "good person" (Letwin said "gentleman") and "friend." I have tended (elsewhere) to dare a bit, and have suggested that the moral tradition Americans inherit accounts for the morals of good people by reference to relationships among good people and friendship in communities,<sup>16</sup> that is, by reference to *friends*, as Letwin says, but with the understanding (which Trollope had, and Aristotle,<sup>17</sup> too) that communities rest on friendship.

Stories are a way to search for meaning in morals; in the present case the meaning in stories about good people who lie.<sup>18</sup> When Charles Curtis, who pondered our problem half a century ago, could not find a satisfactory ethical analysis, he looked for a story. He finally located three stories from his rich career in law practice, and he seemed to think he had found meaning, although he despaired of analysis: "The relation between a lawyer and his client," he wrote, after telling three stories, "is one of the intimate rela-

13 Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987). I am purposely not preserving a distinction between deceit and lying, although I will occasionally mention the distinction, which has a lofty provenance. See my discussion of negotiation, SHAFFER, *infra* note 17, at 350-61.

14 Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives*, reprinted in SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 285-90 (First Vintage Books 1979) (1978).

15 SHIRLEY ROBIN LETWIN, *THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND MORAL CONDUCT* 72 (1982).

16 My daughter Mary and I explored the notion at great length in our book: THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991).

17 Aristotle, *Nicomachean Ethics*, Book Eight, excerpted in part in THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 149-51 (1985); John M. Cooper, *Aristotle on the Forms of Friendship*, 30 REV. METAPHYSICS 619 (1977); John M. Cooper, *Friendship and the Good in Aristotle*, 86 PHIL. REV. 290 (1977); see also GILBERT MEILAENDER, *FRIENDSHIP: A STUDY IN THEOLOGICAL ETHICS* 69-84 (1981).

18 The method is Aristotelian, in what I hope is a commonsensical, lawyer's use of the tradition. Aristotle contemplated the good person. He then reflected on the dispositions, habits, and virtues that combine to make the good person a good person. What good stories do is to present for ethical reflection, through the extraordinary talent and insight of a storyteller, a good person. And then lesser folk (legal scholars even) contemplate what is presented to them by the storytellers, and, among other things, do what Aristotle did: describe the good habits the storyteller shows them in her good person—particularly, in the present instance, the virtues of friendship and truthfulness.

I attempted to justify the method, and to illustrate it, in THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* (1987), there depending heavily on JAMES W. MCCLENDON, *BIOGRAPHY AS THEOLOGY* (1974), STANLEY HAUERWAS, *TRUTHFULNESS AND TRAGEDY* (1977) and STANLEY HAUERWAS, *VISION AND VIRTUE: ESSAYS IN CHRISTIAN ETHICAL REFLECTION* (1974). The method is dependent on the insight of storytellers. I point to stories (as in this essay). In that way, I use stories; I lack the ability to tell stories.

tions. You would lie for your wife. You would lie for your child. There are others with whom you are intimate enough, close enough, to lie for them when you would not lie for yourself. At what point do you stop lying for them? I don't know and you are not sure."<sup>19</sup>

One of Curtis's stories was about a sailor on watch who went off on a "frolic of his own."<sup>20</sup>

While he was gone from his watch his ship collided with another ship. The collision was not caused by the sailor's neglect; the ships would have run into one another anyway. But his shipmates and his captain expected him to lie about the frolic. They wanted him to say he had been on duty when the ships collided. The sailor refused to lie, but no one—not even Charles Curtis—admired him for his stubborn adherence to what appeared to be a moral principle against telling lies.<sup>21</sup>

In the second story, a lawyer lied to save his client from disgrace. The lawyer stuck to his false story through thick and thin and eventually suffered regulatory discipline for it. Curtis refused to disapprove of him.<sup>22</sup> The third story is more like Kant's dilemma: The lawyer there lied about the whereabouts of his client, who was a fugitive from justice, but who needed a couple of days to wind up his affairs before he turned himself in.<sup>23</sup> Curtis applauded that lawyer, and then rendered the conclusion I quoted above.

19 Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8 (1951), reprinted in SHAFER, *supra* note 17, at app. § 13.1.

20 The test, as I learned it from an old English case in a first-year agency course, was between the liability of the "master" for what the "servant" does in the master's behalf, and acts for which the "servant" only is liable. *Joel v. Morison*, 172 Eng. Rep. 1338 (Ex. 1834) (Parke, B.).

21 Curtis, *supra* note 19, at 6. When the captain and crew were with lawyers, preparing for trial:

Captain: "You, of course were up in the eyes on the forecassle keeping a sharp lookout."

Sailor: "The truth is, Captain, I was in the head having a smoke."

Captain (to the lawyers): "That's all right, gentlemen, he'll testify that he was keeping a sharp lookout. Won't you, Sam?"

Sailor: "No. . . . I guess I can't do that."

*Id.*

And then (Curtis):

[S]uch a storm of indignation burst over Sam as he had never seen. The Captain and the rest of the crew cursed him for betraying his ship. Let him go to the head if he had to. Let him even have his smoke if he must. But when he did let him also take the consequences. The collision was not his fault, they agreed. The fog was too thick for him to have seen the other vessel in time, but was he now going to let his own ship down? If he left his post on his own affairs, he had no right to make the ship pay the penalty. What if it was perjury? He'd taken that risk. Not the ship, but he had taken the risk of perjury.

*Id.* at 6-7.

22 Curtis, *supra* note 19, at 7.

I was secretary of the Grievance Committee of the Bar Association at the time, and I was trying to find out whether this man [the client who was being protected] had been blackmailed by some other lawyers. I went to this lawyer and asked him. If he had even admitted to me that he had represented this man, I should have been pretty sure that the man had indeed been blackmailed . . . . The lawyer told me he did not even know the man.

*Id.*

23 *Id.* at 8.

The lawyer goes to where his client is, hears the whole story, and advises him to surrender. . . . [T]hey make an appointment to go to police headquarters. Meanwhile the

I don't think it is a pity that Curtis didn't attempt to analyze these statements, or attempt to round off his stories with a principle. These were cases of lawyers lying to protect their friends, and of a sailor who should have lied to protect his friends. Letwin said such a person might nonetheless be a gentleman, but she did not offer a principle either. She said, by way of understanding Trollope's stories, that a gentleman *will* lie to protect his friend; she did not say when he *should* lie, or when he should not, or what the difference is as a matter of analysis. What she did was look at the stories and underline the fact that a good person will lie sometimes. And then she, like Trollope,<sup>24</sup> approved of what the good person did.

None of Trollope's or Curtis's stories—stories of good people telling lies—is unusual in the Hebraic moral tradition most American lawyers are formed in, but the tradition is not exactly comfortable with such stories either. It ponders them, at least as much as Letwin pondered the stories of Trollope before she concluded that a gentleman who lies will not pretend he has not lied. In my assessment, the moral masters who have preserved these stories for us are concerned about doing two things: First, they are concerned about avoiding an analytical, abstract, negative, universal rule against deceiving others. Second, they are concerned about the corruption of character and community that is the result of lies, and particularly about the social and professional self-deception that makes lies routine and saves liars from shame and guilt.

In the Bible, Elisha lies to save himself and the city from the Syrian army. The Syrians were after Elisha. They wanted to kill him, but they could not recognize him because the Lord had struck them blind. Elisha said to the Syrians, "You are on the wrong road; this is not the town you are looking for. Follow me, and I will lead you to the man you are after." They followed him, and he led them away from the city and into the midst of their enemy's army.<sup>25</sup>

One way to cope with Elisha's lie is to say that it was not a lie. It was, to be sure, deceptive, but analytically the statement was true: Elisha did indeed lead them to the man they sought; and, indeed, if they stayed on that road and went into the city they aimed for they would not find Elisha there,

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client is to have two days to wind up his affairs and make his farewells. When the lawyer gets back to his office, a police inspector is waiting for him, and asks him whether his client is in town and where he is. . . . Of course he lies.

And why not?

*Id.*

24 LETWIN, *supra* note 15, at 71-72. The quality of honesty Letwin admired had three dimensions: (i) clarity about one's own knowledge, (ii) congruence (i.e., objectivity about one's integrity), and (iii) awareness of the character of those with whom one is dealing. Karl Rahner was more strident:

[A]s to what one must actually do, what the real content of life is, the moralizers leave us none the wiser. They seem intent on restricting our lives; they point out the ditches on the right-and on the left-hand side of the road; but what our life and work really are, what contents our hearts, they do not say. All these rules, these prescriptions, all this scolding, these warnings always being volunteered by unenlightened, petty-minded pedagogues and educators do not tell us what is to be done, where our heart and mind are to find fulfillment in this life on earth.

KARL RAHNER, *THE GREAT CHURCH YEAR 273* (Albert Raffelt ed. & Harvey D. Egan trans., Crossroad 1993) (1987).

25 2 *Kings* 6:18-20.

because he did not plan to be there. If the Syrians were deceived by a true statement, the moral issue was not about a lie (statement), but about deception through truthful statements—a different issue. As to either issue—whether Elisha lied or merely deceived—it is relevant to ask whether the person asking the question was entitled to the truth. Since God was on Elisha's side in that story, the answer is no. That way of reasoning—which I admit to having borrowed and used elsewhere<sup>26</sup>—is an example of the analysis I propose to avoid: I think Elisha told a lie. The meaning of the story has to take the lie into account, but not without careful consideration of the person who told the lie and of the rest of his story.

Elisha, chosen by God to be successor to the prophet Elijah, was a miracle worker, a peace-maker, and a healer, as well as a court prophet and a wise and virtuous person. He was the sort of person who is expected to do wise and virtuous things.<sup>27</sup> It helps in that regard, as part of fitting his deception into his life, to notice that Elisha's misleading the Syrian army saved their lives:

After Elisha led them to the wrong city: When the King of Israel saw the Syrians, he asked Elisha, "Shall I kill them, sir? Shall I kill them?"

"No," he answered. "Not even soldiers you had captured in combat would be put to death. Give them something to eat and drink, and let them return to their king." So the King of Israel provided a great feast for them; and after they had eaten and drunk, he sent them back to the King of Syria.<sup>28</sup>

In a second biblical example (there are many others), Rebekah, matriarch of Israel, and her son Jacob lie to their husband and father Isaac, who, having been lied to, blesses the younger son Jacob instead of the elder son Esau.<sup>29</sup> Modern commentators, some of them lawyers, focus more on Jacob's behavior than on Rebekah's, notably with the legal argument that Jacob was only after what he had already obtained by contract from his brother,<sup>30</sup> or with the moral-historical argument that Esau was an unworthy scoundrel, and that what was at issue, after all, was a commission as the Father of Israel.<sup>31</sup> Some of this modern commentary on Jacob is unsound; all of it is tendentious. I suspect that its tendentiousness is caused by the fact that the commentators strain for an analytical principle.<sup>32</sup> It is proba-

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26 THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 86-87 (1994) (quoting to this effect JOHN MURRAY, *PRINCIPLES OF CONDUCT: ASPECTS OF BIBLICAL ETHICS* 142-43 (2d prtg. 1964)).

27 4 MIDRASH RABBAH, *Leviticus* 347 (Judah J. Slotki trans., 3d ed. 1983). He was a miracle worker who prayed for (and apparently received) a double share of the spirit of Elijah. 2 *Kings* 2:9. He made foul water wholesome, bitter soup palatable, an axe-head float on water. He multiplied drops of oil and loaves of bread to feed the hungry, cured leprosy, and brought the dead to life. 2 *Kings* 4, 5.

28 2 *Kings* 6:21-22.

29 *Genesis* 27.

30 *Genesis* 25:31-34. NAHUM M. SARNA, *THE JPS TORAH COMMENTARY: GENESIS* 189 (1989).

31 THE BABYLONIAN TALMUD, 3 SEDER NEZIKIN, *Sanhedrin* 688 (H. Freedman, trans., Quin. ed. 1978) [hereinafter SONCINO TALMUD]; DAVID WERNER AMRAM, *LEADING CASES IN THE BIBLE* 74 (1905); CALUM M. CARMICHAEL, *LAW AND NARRATIVE IN THE BIBLE* 146-50 (1985).

32 AMRAM, *supra* note 31, at 74, is an example.

bly enough to say of Jacob that he was wrong but he was young and he got better later.<sup>33</sup>

Rebekah is the more interesting character for present purposes. She was older, her virtues more firmly fixed. She was a good person, chosen by God to be Isaac's wife, and to be one of the four matriarchs of Israel. She and her mother-in-law Sarah, and her daughters-in-law Rachel and Leah are, in rabbinical tradition, sources of merit for all of Israel; it was due to their merit that the Lord led Israel out of slavery in Egypt. They, and especially Rebekah, are prophets: The Holy Spirit spoke directly to Rebekah—more than once. They are exemplars in prayer, in blessing, and in hospitality.<sup>34</sup> In the Yiddish liturgy the prayerful Jew thanks the Lord because "our mother Rivke . . . caused our father Yankev to receive the blessings from the father Yitskhok," and prays that her merit may cause "the blessings to be fulfilled soon through her children Yisroel."<sup>35</sup>

The meaning of Rebekah's lie is the meaning to be found in her life and mission, and that had to do with her life of devotion to her family—all generations of it—a family of families—and to protecting her family both from a harmful person and the harmful rule of law that placed too much power in a first-born son and made irrevocable a father's ill-considered testamentary gesture.<sup>36</sup> Rebekah's lie resembles, as to both points, the lies told by Abraham and by Isaac, to strangers they perceived as hostile, when they said the women they had married were their sisters rather than their wives.<sup>37</sup>

The Rabbis who focused on the act more than on the life, justified Rebekah's lie, first of all, by noting that she was carrying out the will of the Lord Who had told her that her elder son, Esau, would serve her younger son, Jacob.<sup>38</sup> Some faint rabbinical analysis suggests that Isaac was not deceived anyway; he knew all along—the notion being that a lie is not a lie if no one is deceived by it.<sup>39</sup> In any case, Isaac ratified his own act later, when he knew what he was doing, by blessing Jacob.<sup>40</sup> But he did not pretend that he had not been lied to.

Rebekah's story has more meaning—as Elisha's story does—if you don't try to bleach the lie out of it. The important thing about both of those biblical stories, for present purposes, and taking a somewhat different tack than the commentaries do, is that in each of them an admirable

33 *Id.* at 67; SARNA, *supra* note 30, at 191, 397-98; SONCINO TALMUD, *supra* note 31, 4 SEDER NEZIKIN, *Makoth*, at 170 (H.M. Lazarus, trans.).

34 ALVAN KAUNFER, *Who Knows Four? The Imahot in Rabbinic Judaism*, 44 JUDAISM 94, 99 (1995); see also JOAN COMAY, *Who's Who in the Old Testament*, in WHO'S WHO IN THE BIBLE 320-21 (1980). But see EDWARD J. WHITE, *THE LAW IN THE SCRIPTURES* 38 (1935), which is to the contrary as to Rebekah, but does not reason from the Jewish tradition.

35 KAUNFER, *supra* note 34, at 100.

36 WILLIAM NEIL, *HARPER'S BIBLE COMMENTARY* 57 (paperback ed. 1975); SARNA, *supra* note 30, at 189.

37 *Genesis* 20:1-7; 26:6-11.

38 *Genesis* 25:23; 6 MIDRASH RABBAH, *supra* note 27, *Numbers*, at 809; SONCINO TALMUD, *supra* note 31, 4 SEDER NEZIKIN, *Abodah Zarah*, at 56 (A. Cohen, trans.).

39 SONCINO TALMUD, *supra* note 31, 2 SEDER NEZIKIN, *Baba Bathra*, at 85 (Maurice Simon, trans.).

40 *Genesis* 28:1; 7 MIDRASH RABBAH, *supra* note 27, *Deuteronomy*, at 20-21 (J. Rabbinowitz, trans.); SARNA, *supra* note 30; AMRAM, *supra* note 31, at 74.



person, a good person, told a lie. And somehow we, the readers of the story, not only continue to admire and imitate the good person, we are not able to exclude the lie from what we admire and imitate.<sup>41</sup>

Finally, a modern story. The most popular of American lawyer stories is about a good person telling a lie. (My friends would be disappointed in me if I left this story out.) In this modern story, a lawyer, Atticus Finch, lies to protect his neighbor Boo Radley from being identified as a hero and thereby dragged from his seclusion and privacy and subjected to the kindness of the ladies of Maycomb, Alabama. That episode gave Atticus's story its title, when his daughter Mary Louise (Scout) said that bringing Boo Radley into the civic limelight would be like killing a mockingbird.<sup>42</sup>

The national Legion of Decency rated movies for observant Roman Catholics at the time Atticus's story became a movie. The Legion provided an ethical commentary of its own when it applied sound principles against lies and against doing evil to achieve good, and rated the story as morally objectionable.<sup>43</sup> The movie makers had to change Horton Foote's screenplay<sup>44</sup> so that Atticus became a victim of the lie rather than complicitous in it. They then got a favorable rating for their movie; good Catholics could go to it, and let their children go to it, with a clear conscience. But Atticus would not have agreed with the rating. I think he would have asked the movie makers to change the name of the story's moral hero when they changed the story so that it conformed to the Legion's ethical analysis. He would not have pretended that he did not tell a lie.

What the Legion did was hardly a rabbinical commentary: The Rabbis did not allow themselves the power to change stories; they sought to find meaning in the stories they received. There is, however, a modern commentary that may deserve to be considered rabbinical, at least in a metaphorical sense. It came to me personally, from my friend Herbert Fingarette, a moral philosopher who also, by the way, wrote the seminal treatise on the morals of self-deception.<sup>45</sup> It would be wrong, he said on Atticus's behalf, to "treat the virtue of honesty and truthfulness in terms of an abstract principle to be understood as a logical universal. . . . [This would be] incompatible with the spirit of responding to particular human beings . . . ." <sup>46</sup>

Fingarette spoke of two necessary disciplines in the business of understanding such a story. First, he spoke of the necessity "to deal with persons as such."<sup>47</sup> That is, not only do circumstances alter cases, but *persons* alter cases. Letwin on Trollope defined the skill for discerning differences

41 It is important, too, with regard to these stories from Jewish Scripture, to notice how strong the tradition is against falsehood, without much respect for the distinction between false statements and deceptive statements. See SONCINO TALMUD, *Sanhedrin*, *supra* note 31, at 617; see generally BASIL F. HERRING, *JEWISH ETHICS AND HALAKHAH FOR OUR TIME* (1984).

42 HARPER LEE, *TO KILL A MOCKINGBIRD* 278-79 (Popular Library ed. 1960). Some instances of my use of the story are in my *AMERICAN LEGAL ETHICS* 3-57; *FAITH AND THE PROFESSIONS* 5-25; and *Growing Up Good in Maycomb*, 45 ALA. L. REV. 531 (1994).

43 SHAFFER, *supra* note 17, at 16-17 (discussing Richard N. Ostling et al., *A Scrupulous Monitor Closes Shop*, TIME, Oct. 6, 1980, at 70).

44 HORTON FOOTE, *THE SCREENPLAY OF TO KILL A MOCKINGBIRD* (1964).

45 HERBERT FINGARETTE, *SELF-DECEPTION* (1969).

46 SHAFFER, *supra* note 17, at 17 (quoting Professor Herbert Fingarette).

47 *Id.*

among persons as the virtue of discrimination: What a virtuous person does, and when, and to whom, depends on who other persons are.<sup>48</sup> (There may thus be differences among lies to my client's opponent, lies to the lawyer for my client's opponent, and lies to my client.)

Fingarette's second necessary discipline in understanding a story such as Atticus's bids us "realize that we cannot rely on logical formulae" when we come upon the lie of a truthful person, even when, in turning away from reliance on principle, "we may . . . cop out and rationalize a self-serving act as one based on 'moral intuition.'"<sup>49</sup> Such, he said, is "our dilemma. And Atticus's . . . a man for whom truth is so central . . ." It is "his humbling burden. It would be so satisfying if he could live a life of truthfulness by always telling the truth. No such luck. Truth is more mysterious."<sup>50</sup>

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All of this is, I hope, by way of locating the discussion of truthfulness by lawyers in stories, and in religious moral tradition as it is carried in stories. And all of this is, I suspect, tending to suggest that giving a central place to the relationships and the communities our stories show us may be more satisfactory in ethics than giving a central place to analysis of statements. What I have not done so far is attempt to distinguish between Trollope's stories about gentlemen, Bible stories, Atticus Finch's story, and Curtis's lawyer stories, on the one hand, and the despair that shows up in lawyer jokes and in the scholarly conclusion that there is no way to practice law truthfully, on the other. (Professor Lerman's discussion is, by the way, based on stories told to her by modern American lawyers—which means that one who uses stories in the way she did, and I am doing, may have to think about how to distinguish a meaningful story from a story that lacks meaning.<sup>51</sup>)

I want to suggest that it might be helpful toward exploring that distinction to return to the ethical possibility I suggested at the beginning, a possibility that is given narrative display in these stories: Truthfulness can be understood not only in reference to statements taken one at a time, but

48 LETWIN, *supra* note 15, at 69 ("When faced with transgressors, he will consider whether he is dealing with an eccentric, a ruffian, or a villain.").

49 SHAFFER, *supra* note 17, at 17 (quoting Professor Herbert Fingarette).

50 *Id.*

51 There is an art and a discipline for deciding what stories are good—that is, truthful in their description of the good person. See *supra* note 18. The perception is, no doubt, in large part intuitive and aesthetic. It is like standing before a painting and admiring the truth in what the painter has done. It is not an analytical art (although, to be sure, there are those who analyze paintings, as there are those who analyze stories). Part of the art and part of the discipline are aspects of faith. That is, the truthfulness of a story is related to its conformity with the "master story" revealed in Scripture. The religious dimension is developed theologically in MICHAEL GOLDBERG, *JEWS AND CHRISTIANS: GETTING OUR STORIES STRAIGHT* (1985), and HAUERWAS, *TRUTHFULNESS AND TRAGEDY*, *supra* note 18, at 35. Hauerwas puts a set of tests that turn less on analytical prowess than on perception. He asks whether the story (1) has power to release its readers from destructive alternatives; (2) provides ways of seeing through distortions; (3) provides room to keep its readers from having to resort to violence; and (4) observes a sense of the tragic—that is, the conviction that, ultimately, meaning transcends power. *Id.* at 35. Anne Tyler's novels almost always meet these criteria; crime stories rarely do, mostly because they fail to account for human evil.

also in reference to the relationships and the communities on which all stories rest. We academic ponderers might benefit as much from paying attention to the human connections we see in our stories as from analysis of rules and principles and single instances. (Professor Menkel-Meadow's commentary on Lerman's essay reflects that dependence on stories, I think.)

Atticus Finch practiced law in a morally sustaining community, and, within that (as within a smaller concentric circle), in relationships of the sort Curtis described with the word "intimate." In the moral crisis that followed Bob Ewell's death, Atticus at first refused to lie; the reason he gave for refusal was concern for his children: "[I]f they don't trust me, they won't trust anybody. . . . I can't live one way in town and another way in my home."<sup>52</sup> After he later lied anyway, he turned to his daughter for understanding and drew necessary comfort in his moral pain from knowing that she understood. He sought and gained not so much approval of his lie as Scout's understanding that this was, after all, the sort of thing a good person—a truthful person—might do in such a case. Scout did not announce a principle in her statement of understanding; she used a narrative analogy: Not to lie would be like killing a mockingbird. Her father's action did not fit a principle, but it was a *fitting* thing to do.

I notice, again, how the virtue of discrimination works: Atticus deals differently, in being truthful, with his daughter, with the Sheriff, who suggested the lie to him, and with his neighbors who are lied to. Earlier in the episode, when he thought it was his son Jem who had killed Ewell, he refused to lie: It would have been necessary for Jem to face the admiration of the ladies of Maycomb and to be known as a killer, but it was not necessary that Boo Radley go through such an ordeal.<sup>53</sup>

It seems that the story of how a good person lies is like that: Trollope also described a system of concentric circles, from family to empire, in which (in his view) trust among Aristotelian friends (gentlemen) was the moral glue that held Victorian society together.<sup>54</sup> The biblical stories are about the survival of a family and a family of families (Israel), and are thereby another system of concentric circles: It is not so much that Israel required the lies of Elisha and Rebekah as that Israel understood and survived the lies, the circumstances that led to the lies, and the consequences of the lies. The same meaning is in Curtis's much shorter stories—evident, for example, in the pressure shipmates put on one of their own to lie to save the ship.<sup>55</sup>

<sup>52</sup> LEE, *supra* note 42, at 276.

<sup>53</sup> Atticus may have been wrong about that. From an analysis that considers the overarching modern ethical value of equality, it might have been better for Boo Radley, a mentally retarded adult, to be exposed to the community (and better for the community to deal with him face to face). The reason Jem was treated differently was because he was in training to become the sort of gentleman his father was. My reflections along these lines are what provoked Fingarette's rabbinical commentary. See *supra* note 43.

<sup>54</sup> C.P. SNOW, TROLLOPE: HIS LIFE AND ART 9-18 (1975).

<sup>55</sup> "Intimate" relationships within communities are not as clear in the other two Curtis stories, but imagining such relationships (midrashim) is consistent with the stories and with Curtis's understanding of them.

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There is a shadow side to this way of understanding how it is that lies are told by good people—that they come about in reference to relationship and community<sup>56</sup>—in a system of concentric circles. The shadow side is in the insight announced by Emile Durkheim and his sociology of deviance: To describe by moral direction a relationship or a community is to draw boundaries that exclude people.<sup>57</sup> When a good person lies she seems to confront and then abuse the dignity of the person she lies to—an action that offends both the Kantian notion that a human person should never be used merely as a means to an end, and the ideology that yearns for a communitarian ethic.

Consider Sissela Bok's pondering of an extreme instance (also illustrated by what Elisha said to the Syrians): Lying to *enemies*.<sup>58</sup> Bok's example was the "elaborate hoax" practiced on Hitler's army by the Allies before the invasion of Normandy—D-Day, 1944. General Eisenhower and his British and Free French colleagues there successfully deceived the Germans into thinking that the invasion, which was obviously imminent, would occur somewhere else. As bad as the beaches of Normandy were, they would have been much worse had the Germans not been lied to. If that historic example of a lie told by good persons can be justified, perhaps it can be used metaphorically to examine other instances of lying from the community, to people who are excluded from the community.

Could Professor Monroe H. Freedman have used General Eisenhower's example when he dealt with the lawyer for the hotel managers who discriminated against homosexuals?<sup>59</sup> Could a legal-aid lawyer use the General's example in dealing for poor people with the Immigration and

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56 Alasdair MacIntyre and Stanley Hauerwas, writing in medical ethics, speak of modern American society as a "society of strangers" in which vocational focus is problematic because the society in which a vocation is practiced does not envision or nurture a coherent notion of common good. That is (as I understand it), those who function in the society no longer divide up the territory, so that a professional person can with confidence attend to the matters in which she is recognized as competent—can no longer trust that other vocations, with other competences, will see to needs for which she is not competent. STANLEY HAUERWAS, *SUFFERING PRESENCE* 42-62 (1986); Alasdair MacIntyre, *Patients as Agents*, in *PHILOSOPHICAL MEDICAL ETHICS: ITS NATURE AND SIGNIFICANCE* 197 (Stuart F. Spicker & H. Tristram Engelhardt, Jr. eds., 1977). Reflecting, as this paper sometimes does, on the situation of those for whom "strangers" are Hobbesian forces, claiming the "right" to exploit and consume those who find them both strange and vulnerable, is an even more ominous prospect. See James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michael Villey*, 39 AM. J. JURIS. 185 (1994); see also ARTHUR J. DYCK, *RETHINKING RIGHTS AND RESPONSIBILITIES: THE MORAL BONDS OF COMMUNITY* (1994); J. Brian Benestad, *Rethinking Rights and Responsibilities: The Moral Bonds of Community*, AMERICA, June 3, 1995, at 27 (book review). It may be possible, for those who are oppressed by the exercise of Hobbesian freedom by hostile strangers, and for their advocates, to invoke political and legal notions of rights that respect limits. However, it is always the case that moral claims of right are more pervasive and less protective than legal claims of right—so that there is an area for law practice, in which guile rather than law is the substance of practice. Benign Christian and Jewish ethics might, with a different focus, speak of this as an area in which charity, rather than justice, is the substance of ethical practice: Friends, Aristotle said, have no need of justice.

57 See KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 1-29 (1966) (discussing EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (1895)).

58 Bok, *supra* note 14, at 141-53.

59 This story and Professor Freedman's conversation with me about it are what led me to think about this subject for use at the Hofstra conference. *Acceptable Lies*, LEGAL TIMES, Feb. 20, 1995, at 24.

Naturalization Service, or with the relentless creditors who design, impose, and exploit the small claims court system to garnish the wages of the working poor? Professor Freedman and I will not convince anyone that these opponents are as bad as the armies that occupied France and threatened Britain sixty years ago, but we could parade familiar horrors, I think, to the point where people of reason and good conscience would locate oppression, even systematic oppression—and injustice, even systematic injustice.

We might even persuade reasonable people of good conscience to recognize the presence and persistence of a class system in modern America.<sup>60</sup> If we got that far—to the point where the practice of law in modern America could be seen as a theatre for class warfare—we could raise for consideration an idea Bok borrowed from Machiavelli:

[A] prudent ruler ought not to keep faith when by so doing it would be against his interest. . . . If men were all good, this precept would not be a good one; but as they are bad, and would not observe their faith with you, so you are not bound to keep faith with them.<sup>61</sup>

The Machiavellian consideration would be useful because it would let us talk about the community, or communities, within a class: that is, about the relationships and communities we lawyers would protect by lying to the oppressors of such relationships and communities. And then we could move to the not entirely metaphorical, Marxist use of the notion of class *warfare*. We could talk, then, about opponents in war, about D-Day, and about lying to enemies. Bok borrows from one of Sartre's characters the apposite use of metaphor in this way: "I wasn't the one who invented lying. It grew out of a society divided into classes, and each one of us has inherited it from birth. We shall not abolish lying by refusing to tell lies, but by using every means at hand to abolish classes."<sup>62</sup>

I will stop this line of analysis here because what it does is strain for a principle. Its extremity shows how straining for principles can work. It gets too far away from my present purpose, which is to notice stories about good people who tell lies. I will also avoid further description of the moves from community to class and from oppression to warfare, and say only that I am persuaded that these are coherent moves just now, even in America, and that there are some days, in legal-aid practice, when the stories I am in

60 Robert E. Rodes, Jr., *Law, History, and the Option for the Poor*, 6 LOGOS 61 (1985), and ROBERT E. RODES, JR., *LAW AND LIBERATION* (1986), use such an analysis from Marx by way of Latin American liberation theology, especially, as to the first, the "new class" theory in MILOVAN DJILAS, *THE NEW CLASS* (1957), and, as to the second, GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION* (1973).

61 Bok, *supra* note 14, at 143-44. Nonetheless, there are degrees of keeping faith. There is, for example, a point of view in our warlike culture that says it is better to kill a person than to lie to him. See 3 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 232-35 (No. 58) (Sonia Orwell & Ian Angus eds., Penguin Books 1970) (1968). The argument seems fatuous to me, as it did to my friend Professor Stephen L. Pepper:

[T]he analogy to World War II was powerful, but I thought too much so: it seemed to be overkill, to go too far. War justifies far more and far worse than lying. And distinguishing the justifiable from the unjustifiable war, or the acceptable from the unacceptable in the conduct of war, are formidable tasks—to say the least.

Letter from Professor Stephen L. Pepper, University of Denver College of Law, to Thomas Shaffer, Professor of Law, University of Notre Dame (Aug. 23, 1995) (on file with author).

62 Bok, *supra* note 14, at 174-75 (quoting JEAN-PAUL SARTRE, *DIRTY HANDS*).

the middle of cause me to find these moves compelling. I do not, however, make any confessions at present.

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There are two huge inhibitions on letting stories lead us to thinking this way about truthfulness in the practice of law. One is the implicit corollary that one does not lie to those who are *not* enemies.<sup>63</sup> The other inhibition comes from noticing how the stories show our manifest and communal tendency to deceive ourselves when we go about deciding who our enemies are.<sup>64</sup> (One might notice, as Professor Freedman has, that even Atticus Finch, in his community, deceived himself, especially about the nature and sources of the racism practiced in rural Alabama in 1935.<sup>65</sup>)

The first inhibition is illustrated by the issue of *lying to a professional friend*. If one lies to a person who is within the relationships and communities I have been talking about—and even good people do that sometimes—the ethical issue would likely involve consideration of *benign* lies (and would be beyond what I am attempting here). But lies from one lawyer to another are, I think, a different case, distinguished from the issue of benign lies by the fact that lies on behalf of one's client are vicarious.

If the metaphorical use of lies to enemies is useful in negotiation between two lawyers, a distinction is needed between the inimical people who are oppressing my client and the lawyer who represents the inimical people: The clients are enemies; the lawyers are not. The lawyers are professional friends—of one another; lawyers live and work in a community of lawyers.<sup>66</sup> Even when I sit still and let a legal-ethics class roam freely in the garden of my Marxist suppositions, I suggest that there is a moral consensus among us that, surely, we lawyers should not lie to (us) other lawyers.

The immediate, pragmatic reasons for not lying to lawyers include avoiding professional discipline or retaining credibility with other lawyers—both necessary if a lawyer is to be in a position to represent, and thereby to protect, clients and their relationships and their communities. (Sometimes, alas, the students' stories provoke me to exceptions.) The deeper reasons for this collegial inhibition are not pragmatic and analytical. These deeper reasons are as much based in friendship as the lawyer's faithfulness to her client is. What of these deeper reasons? I hope you will forgive me for approaching that question in an indirect way, in terms of what Charles Curtis said about lying to judges:

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63 The stories show how a good person does sometimes lie to a friend, but a lie to a friend, assuming self-deception is under control, does not exclude or abuse the friend. I am not talking in this paper about the interesting subject of *benign* lies. See generally Menkel-Meadow, *supra* note 7.

64 My present concern for self-deception in identifying enemies is perhaps related to deciding, as Jesus did, what to do about enemies; Jesus's teaching assumes that one *has* enemies. I want to notice that and also to notice that the perception that someone is my client's enemy may be the result of clear-sighted realism. I am influenced here by Stanley Hauerwas, *No Enemy, No Christianity: Preaching Between 'Worlds'* (unpublished essay on file with author).

65 Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994).

66 See SHAFFER, *supra* note 17, at 146-60, 427-33 (discussing the point, from Aristotle, David Hoffman, and others).

Curtis said, after he allowed for a lie from one lawyer to another: "[I]t is inadmissible to lie to the court."<sup>67</sup> Why? One deeper reason for making a special case for lawyers who are also judges is the "officer of the court" tradition. If you pursue that reason very far, though, you tend to make a god of the state. In this way, Curtis gave what I think is a *theological* reason for making a special case against lying to judges: "I take it that it is inadmissible to lie to the court," he said, because "[a] lawyer's duty to his client cannot raise higher than its source, which is the court."<sup>68</sup> When I put Curtis's article in my teaching book on American legal ethics, I dropped a footnote after that sentence, asking the reader to "[n]ote my puzzlement."<sup>69</sup> I meant by that footnote to suggest that Curtis's distinction between lies to other lawyers and lies to other lawyers who are judges is not defensible ethically, even if it is defensible on more mundane (i.e., pragmatic) premises.

A lawyer's duty to her client is, I suppose, a moral duty. It comes about, as Curtis said, because of a relationship as "intimate" (his word) as those within a family or among friends. Such relationships are not created by the state, as relationships between judges and other people are. Nor are the relationships lawyers have with one another. To say that they are created by the state, as Curtis did, is to make the state a substitute for the Creator. So—that reason for not lying to other lawyers who are judges won't do, and therefore I would not make a special case for other lawyers who are judges.

I raise the point to emphasize the distinction between mundane, non-moral reasons for not lying to other lawyers, including judges, and the deeper reason that rests in friendship. Curtis had a theological reason that caused him to distinguish between lawyers and judges. His reason comes too close to idolatry for me; it is bad theology. But his (as I think) error gives me a way to explain my own theology on the matter: When I deal with the lawyer for the other side, who is not my enemy, I deal, within a community and within concentric circles of communities, with the noblest work of God, as much as when I deal with my own client. What is present in both cases is a relationship within a community.

Of course—to get back to the main point of this paper—I also deal with the noblest work of God when I deal with my client's enemy.<sup>70</sup> The stories do not evade this reality: Elisha, for example, by his deception, led the Syrian army into a city where they were not harmed; Rebekah had to face the fact that Esau was her son, and Jacob the fact the Esau was his brother—and they both did face those facts. Curtis's lawyers had to face the fact that they were lying to other lawyers—and one of them was willing to accept discipline from the other lawyers because of the lie.

The difference is that, in the case of dealing with my client's enemy, and making metaphorical use of General Eisenhower's example, I am dealing *across* the lines of relationship and community that have historically

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<sup>67</sup> Curtis, *supra* note 19, at 7.

<sup>68</sup> *Id.*

<sup>69</sup> See SHAFFER, *supra* note 19, at app. § 13.12 n.4.

<sup>70</sup> Jesus spoke about that, if one can assume that what he said about enemies applies to vicarious enemies.

made a phrase such as "noblest work of God" intelligible.<sup>71</sup> The present problem arises because, for a lawyer acting in the sort of case Monroe Freedman and I talked about, one of the persons I am dealing with, the other lawyer, is in an important sense *within* community lines, and the other, the other lawyer's client, is not. (Particularly not if what we are talking about is oppression and class warfare.)

Professor Freedman's recent discussion of our subject illustrates the context of negotiation between lawyers. It is a context in which we lawyers preserve trust and truthfulness among ourselves, and allow for more hostile confrontation between our respective clients, with a vocational etiquette that normally allows us to evade and fictionalize *so that we do not need to lie to one another*. The complexity of the etiquette is illustrated, I suppose, by saying that it allows for the possibility of a lie from client to client, through their lawyers, but not for either lawyer to lie to the other lawyer. It sometimes depends, as Geoffrey Peters noticed years ago, on maintaining a distinction between deceiving somebody and lying to her.<sup>72</sup> (But it is, when considered that way, the practice of analysis.)

In the story Professor Freedman told, his clients sought a four-figure settlement. He was asked, by the lawyer for the other side, what his authority to settle was (four figures or five?). I thought, as Professor Freedman and I talked later (Monday morning quarterbacking, to be sure), that the question was intrusive and that professional etiquette therefore, in that case, justified evasion and misdirection. If I had been asked whether my client expected four figures or five, I would have evaded the question in such a way as to suggest that the answer was five, or at least in such a way as not to reveal anything at all.<sup>73</sup> When seen as lawyer-to-lawyer etiquette, this way of looking at deception might be fitted into Professor Menkel-

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71 I borrow the phrase from a litigation story—what I think is the first tax case in the federal supreme court, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 462-63 (1793). In that case, Justice James Wilson made the point that the taxpayer is more important, ultimately, than the tax gatherer. His comparison was one made about relationships and within community lines.

72 See *supra* note 13.

73 See *supra* note 59. The story also involved a second lie, in which Professor Freedman told the lawyer for the other side that his clients had not been able to mitigate damages—which, in fact, they had. I suggested evasion there as well, an example of which would be to say something like, "We are working on it." I find, in discussing this part of this paper with students and colleagues, that they tend to go along with me on the evasion described in the text, but not on this second evasion. The reason that comes out of discussion with them is that the fact of mitigation of damages is a discoverable fact. I don't find that reason persuasive, in view of the fact that the negotiations Professor Freedman describes were aimed, by both sides, at preventing the litigation from which discovery might eventuate. But, out of respect for my friends, I limit the point to a footnote.

Kenneth Kipnis discusses lies to judges in the context of questions asked, in court, by judges, of lawyers, which impinge on confidentiality. He wonders whether the relevant principle on confidentiality would permit a truthful answer that is helpful to the client, but would forbid lying to judges when the answer would not be helpful. He announces the principle that "if it is improper for attorneys truthfully to answer questions when the truth will hurt a client, it is equally improper to answer when the truth will help." KENNETH KIPNIS, *LEGAL ETHICS* 94-95 (1986). Machiavelli and Sartre would not be persuaded; neither am I. We have Rule 1.6(a) of the Model Rules of Professional Conduct (concerning confidentiality of information) on our side, I think. More usefully, Kipnis suggests several possibilities for evasion; some of these are at least as harmful as a truthful answer would be, but others fall within the etiquette I suggest in the text. Because evasion is available, Kipnis is able to conclude that "the case for deception cannot be made." *Id.* at 95.



Meadow's reworking of the Golden Rule: I am willing, in using this etiquette, to allow that it can be used on me, if I get too pushy. This is the way lawyers sometimes talk, and it is justified, among lawyers, even at the edges of falsehood. A friend and law-school classmate perhaps made this point when he sent me a reprint of Professor Freedman's essay on our conversation with the note, "A lawyer cannot represent *both* sides."<sup>74</sup>

I also suggested to Professor Freedman, when we talked, that he consult what I think of as the old Catholic casuistry that permits deception when the question asked is unacceptably intrusive—as, I think, within lawyer etiquette, the question put to him was. When the life-insurance salesman comes to the door and asks, "Is your mother at home?" such casuistry allows a child to answer, "No," and to think to herself, "Not to you." (Victorian etiquette pursued this reasoning into what lawyers would call a legal fiction, by giving "at home" a conventional meaning that included what the child thought but did not say; it was not a lie; it was like what Rebekah did to Isaac, if you assume that Isaac knew what was going on.)

The practice of this etiquette is a subtle art; the lay public no doubt excoriates us lawyers for it, even as it practices similar casuistries of its own, or, more sadly, justifies overt lies when lies are not necessary. (A common example is deception of those suspected of crime; detective stories—from Sherlock Holmes to James Rockford—depend on deceiving bad people.<sup>75</sup>) But it is, as much as legal fiction in common-law pleading was, a way for lawyers to work together truthfully. Lawyers in a peaceful community practice such an etiquette and through it are able to save their clients from the pain of litigation in something more than ninety percent of all cases.

Lawyers for the oppressed—especially lawyers who act in regimes of tyranny—practice such an etiquette in order to remain in practice.<sup>76</sup> And if our lawyer stories tell us nothing else they tell us that it is a good thing when good people continue to be able to function for the oppressed and in regimes of tyranny. Our stories tell us that—from the story of Elisha and the Syrians, to the story of Atticus Finch, to Rebekah's and Jacob's tactics for avoiding the tyranny that would have been brought to the children of Abraham if Esau had become their leader. The remarkably hopeful possibility is that modern American lawyers, within such rude necessities, also might manage an etiquette that supports their being truthful friends.

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<sup>74</sup> Lest there be confusion: This is distinguishable from a lawyer's making and keeping promises to another lawyer, although careful lawyers know that it is important to attend to the exact terms of the promises made, precisely because we are committed to keep our promises to one another. I suppose that, when Professor Freedman and the lawyer from the hotel arrived at a settlement, it was effectively sealed by oral promises the two lawyers made to one another.

<sup>75</sup> See my discussion in SHAFER, *supra* note 17, at 350-61; see also Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722 (1989) (discussing deception by police officers and other pursuers of criminality.) In that situation, Shine says, "a person operating in an official law enforcement capacity or under equally compelling circumstances needs to be treated differently than the general population." *Id.* at 738. He proposes amendments to the Model Rules: "[L]ying is sometimes not only ethical but preferred . . ." *Id.* at 752.

<sup>76</sup> It becomes plausible, in a tyrannical regime, for the oppressed to regard the tyrant who oppresses them as an enemy. See Bruce Frohnen, *Tocqueville's Law: Integrative Jurisprudence in the American Context*, 39 AM. J. JURIS. 241, 258, 264 (1994).

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*Nonetheless:* Lying destroys character. It destroys relationships. It destroys communities. Ethical reasoning (whether from analysis of statements or from stories) that justifies lying in rare and extreme cases ("in crisis" as Sissela Bok has it) is useless unless the warnings on the label are as stark as that. (I suppose, to linger over that metaphor, that I am arguing in this essay from the warnings on the label rather than from directions for use.)

When Bok justified the hoax the Allies played on the German army—even there—she warned of all three of these dangers.<sup>77</sup> The ability of the Trollopian gentleman to lie to save his friend and remain a gentleman lay in his refusing to lie to himself—and, no doubt, in making sure, before he lied, that the issue really was something as grave as his friend's life or death. Atticus Finch lied and saved his character (Scout said that his story was the story of a conscience), but we know that the lie brought him pain, and that he would not easily lie again.

That last point needs underlining: Atticus will not easily lie again. How do I know that? The answer is that his story is the story of a truthful person. He was truthful within his community and, more importantly, he was truthful to himself. The community Atticus lived in was worth saving from the corrosions of falsehood and was, in that way, like the biblical community of the Hebrew Prophets—worth the truth, and so the Prophets spoke truth to power—and in it Atticus spoke the truth (with a significant exception). Even his lie was a lie told in reference to the community; the

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<sup>77</sup> Bok, *supra* note 14, at 148-51. Bok's recourse for weighing such judgments is the opinion of "impartial onlookers." I doubt that there are any. She appeals also to the common good, which is not the same thing and which is within the ken of onlookers who are not impartial. Common-good thinking among us does, of course, depend on whether there is at least a vital remnant of a moral tradition in the Christian West. This is in one sense an empirical question. One can, in treating it that way, for example, make inferences for ethics from what people say about their beliefs and practices. Thus, something more than 80 percent of Americans describe themselves as God-fearing churchgoers. See George Gallup, Jr. & Jim Castelli, *Nine of Ten Share a Belief in God*, WASHINGTON POST, Nov. 28, 1987, at B-6; The Gallup Report, *Religion in America*, No. 259 (April 1987); Peter A. Brown, *Americans Tend to be Different*, SOUTH BEND TRIBUNE, Apr. 9, 1995, at A-16 (reporting on a survey by the Roper Center for Public Opinion Research). The question can be treated another way, as part intuition, part a sense of history, part a sort of philosophical anthropology, that says people in our culture are the sort of people who necessarily, by implication from what sort of creatures they are seen to be, hold a common moral tradition. For an example that builds a certain triumphalist mood, and no doubt covers too much:

It is . . . idle to imagine that relations between North America and Western Europe can be wholly invigorated by a round of trade talks. To believe that is certainly to do less than justice to the full range of values and interests that they have in common.

These values and interests reflect what is broadly a common outlook, arising from broadly the same cultural tradition and directed at broadly the same set of aims and ideals. They have been responsible for much of the world's present shape. They are not all noble or immune to criticism. But in the second part of this century they have seen off fascism and communism, laid the foundations for democracy in countries that had known little but despotism, and helped to spread prosperity on a scale unsurpassed in human history.

If North America and Europe can maintain the dynamism of this shared identity, they can continue to shape the world for the better.

*In Need of Fastening*, THE ECONOMIST, May 27, 1995, at 16.

community could not know the truth in that rare instance, but it would have understood the necessity for the lie.<sup>78</sup>

Perhaps I could as easily say the same of a lawyer whose clients are in one of our hidden communities of undocumented aliens—people the late Justice Fortas might well have included in his categories of “constitutional non-persons” in America.<sup>79</sup> Or I could say the same of a lawyer whose client has been bilked a dozen ways, all of them within the law, by car dealers and finance and insurance companies and small-claims courts. To whom, H. Richard Niebuhr would ask, is a lawyer responsible in situations like that? And in what community?<sup>80</sup> The answers I think I learn from stories of good lawyers who lie are: I am responsible to my client and to those she loves. And I am responsible in *my client's* community.

When is falsehood consistent with that responsibility, in that community? Storytellers tell us not to say “never.” Well, then: When? Charles Curtis said, “I don’t know and you are not sure.”<sup>81</sup> But our stories also say that lawyers can accept that “humbling burden” and practice law truthfully.

### CONCLUSION

Professor Fingarette, after reading an early draft of this paper, wrote that he had two reasons for feeling insecure about my thesis here (if that is what it is). “Partly . . . there was insecurity because of the *intended* uncertainty, a crucial feature of your thesis . . . . And partly I was insecure because the argument of your paper is not as clearly focused as it should be.”<sup>82</sup>

I take the criticism seriously. My defense for being obscure, at present, about an ethical argument, is that I want to point to a source for reflection rather than to a principle or system. Professor Fingarette honors my objective in this regard when he says, “I end up being induced to reflect at length, and profitably.”<sup>83</sup> And that is what I am after. I do not want my readers here to fasten on some resolution of mine and miss the point of the paper, which is to invite them to consider stories as a source for ethical reflection. It could be—probably will be—that a reader of this will find a different meaning in these stories than I would. That will be because a reader of stories (and I do not *tell* stories; I merely point to them) brings her own story to bear on them and has her own relationships with the tellers of the stories.<sup>84</sup>

But, still, I take the criticism seriously. (I have had it from others who kindly read this manuscript.) If I were to try to come closer to some sort of

78 As my students always do; I have never been able to get them to disapprove of Atticus.

79 The substance and meaning of the notion is in his opinion in *In re Gault*, 387 U.S. 1 (1967). I remember the phrase “constitutional non-persons” from a talk he gave at Ohio State University, in (I think) 1969.

80 H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN MORAL PHILOSOPHY* 68 (1963).

81 Curtis, *supra* note 19, at 8.

82 Letters from Herbert Fingarette, Professor of Philosophy, University of California, Santa Barbara, to Thomas Shaffer, Professor of Law, University of Notre Dame (Aug. 5, 1995 [hereinafter Fingarette Letter, Aug. 5, 1995] & Aug. 17, 1995) (on file with author).

83 Fingarette Letter, Aug. 5, 1995, *supra* note 82.

84 For my explication of this notion, see SHAFFER, *supra* note 18, ch. 1.

focus I suppose it would be this Aristotelian admonition: Raise your children to be truthful people. Tell them stories about truthful people. Hold up truthful people as examples, and try in your life to be a truthful person for your children. Your children, formed in the virtue of truthfulness, will not find analysis of statements and application of principles unimportant; but they may find such analysis and such principles *secondary* and *provisional*, and that will be a good thing. If they should happen some day to undergo a legal education in modern America, they will then be armed against the corruption of legal education in modern America.

Beyond that, I can do no better by way of focus than what Professor Fingarette wrote to me:

[T]here is no neat resolution of the questions, and *that* is the resolution. . . . [Y]ou forego complete reliance on principle and analysis, and instead you found your views on stories and on fundamental personal character, allowing for situations in which the good person does deceive or lie. Of course I don't mean that you open this up so that they have a morally free rein. There are stringent restrictions on such doings. But life is complex, faithfulness to one's commitments and one's community may call in very exceptional situations for exceptional means that are otherwise rarely justifiable, and we have to look ultimately to the person, to the goodness of character, good will, the spirit of the deed. And we do see in the stories you cite that it can occur that good people for good reason deceive.<sup>85</sup>

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85 Fingarette Letter, Aug. 5, 1995, *supra* note 82.

